Supreme Court, U.S.
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No. 01-1416

In The

Supreme Court of the United States

BRENDA LEE NADELL and BRIAN SIDNEY NADELL,

Petitioners,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, OFFICER S. LEYBA, OFFICER M. ETHERTON, OFFICER G. ZEIL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether the Ninth Circuit correctly held Petitioner failed to establish a legitimate expectation of privacy in the facts of this case, sufficient to give rise to a Fourth Amendment unlawful search claim, when Petitioner Brenda Nadell was not established as an overnight guest in the home?

2. Whether the Ninth Circuit was correct that an instruction of nominal damages is valid in a civil rights excessive force claim?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners Brenda Lee Nadell and Brian Sidney Nadell (hereinafter "Petitioners"), acting on behalf of themselves. Appearing as Respondents before this Court are the Las Vegas Metropolitan Police Department and Officers Leyba, Etherton and Zeil.

Since the Las Vegas Metropolitan Police Department is a governmental agency, no corporate disclosure statement, required by Supreme Court Rule 29.6, is necessary.

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CITATION OF OPINION

This case is a Petition for Writ of Certiorari from the Ninth Circuit decision of *Nadell v. Las Vegas Metropolitan Police Department*, 268 F.3d 924 (9th Cir. 2001).

JURISDICTION

On March 1, 1999, at the conclusion of a several-week trial, a verdict was entered by the jury which held one of the Defendant officers liable for the use of excessive force and awarded nominal damages to Petitioner Brenda Nadell in the amount of $1.00. *See* Petitioners' Appendix B. Thereafter, this matter was timely filed before the Ninth Circuit Court of Appeals and this decision by the Jury, along with the propriety of a prior decision by the District Court Judge to dismiss an unreasonable search and seizure claim, were brought to the attention of that august body.

The decision of that Court, sustaining both of these issues, was filed by the Ninth Circuit Court of Appeals on October 5, 2001. Petitioners' Petition for Writ of Certiorari notes no petition for rehearing was timely filed. However, the Ninth Circuit did entertain, and reject, Petitioner's Request for Rehearing on December 17, 2001. This Petition is sought within 90 days of that date and would, therefore, seem to be timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents admit Petitioners' Complaint alleged a violation of Brenda Nadell's Fourth Amendment rights while she lay at the home of another in a drunken state. The instant Petition makes no direct reference to the Fourth Amendment but a fair reading of it seems to indicate the Fourth Amendment proscription against unreasonable search and seizures is being challenged. In addition, Petitioner is challenging the application of nominal damages in civil rights suits.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On September 8, 1995, Petitioners filed a lawsuit naming the Las Vegas Metropolitan Police Department and Officers Leyba, Etherton and Zeil as Defendants. Petitioners later amended their Complaint and a responsive answer was filed on January 27, 1997.

After discovery concluded, the matter proceeded to trial on February 8, 1999 and concluded March 1, 1999. At the close of Petitioners' presentation of the evidence, Respondents moved for judgment as a matter of law on all claims. The District Court granted dismissal relative to Brenda Nadell's unreasonable search and seizure claims – ruling the evidence showed she was only temporarily present in the home when the officers arrived on the night in question; accordingly, she lacked standing to bring that particular Fourth Amendment claim.

The jury at the case's conclusion, determined Officer Steve Leyba was liable for use of excessive force and, as a result, awarded $1.00 in nominal damages. A defense verdict was returned against Petitioner Brian Nadell.[1]

After post-trial motions were decided, an appeal was filed on May 21, 1999 to the Ninth Circuit Court of Appeals. There Petitioner challenged the issues which she attempts to bring before this Court. The Ninth Circuit, however, disagreed and held the District Court was correct in dismissing her Fourth Amendment claims as there was no evidence adduced proving Petitioner was an overnight guest. In addition, the Ninth Circuit sustained the instruction of the jury as to the application of nominal damages in a civil rights case. This decision issued on October 5, 2001.

II. STATEMENT OF THE FACTS

On or about July 22, 1994, Petitioner Brenda Nadell went to the home of one Michael Laing with her sister and her small child in order to allow her younger sister to interview for a babysitting job. This business meeting then evolved into a party where all the adults in the home became seriously inebriated. Petitioner Nadell did not bring with her any clothing or hygiene items to suggest she was either invited or that she planned to spend the night. Rather, the testimony indicated Petitioner became so intoxicated she, at best, was unable to travel and was

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[1] This raises the question as to whether or not Mr. Nadell even has standing to be involved in the instant Petition since, by its very terms, the Petition only addresses claims going to Brenda Nadell.

permitted to temporarily lie down in a room because of her intoxicated state. While she was in an unconscious state a domestic dispute between Michael Laing and his spouse arose such that a plate glass window was broken at the front of the home and Ms. Laing was seriously injured – requiring hospitalization.

Officers Etherton and Zeil were dispatched to this home in response to a domestic violence call. Upon arriving, they observed not only the broken window but blood all over the front porch area, the window, the window sill, the wall of the home (both inside and outside), the curtain, a couch inside the home, and a carpeted area just inside the door. There was also evidence presented that the officers, entering the home, saw a young female (who had blood on her person) stand up and exit the living room with a small baby in her arms. They were unable to immediately detain her for questioning and, instead, she continued on to a back bedroom.

Officer Etherton followed and made contact with the woman in the back bedroom – and in so doing encountered Petitioner. Officer Leyba arrived shortly thereafter. Petitioner Nadell, in her interaction with Officer Leyba, began screaming at him and attacked him. She was ultimately restrained by being pushed up against a wall and wrestled to the ground.

The evidence before the trier of fact also indicated that, at the time the officers arrived at the home, they did not have an understanding that the individual who had bled so profusely through the home had been taken away by ambulance or whether more than one individual was injured. On these facts, it is respectfully submitted the

District Court and Ninth Circuit Court of Appeals were absolutely correct in deciding that Petitioner Nadell had no Fourth Amendment unreasonable search or seizure claim in this case.

As a simple matter of law, the issue of nominal damages will speak for itself and need no further factual explication at this time. However, it is submitted that reasoned consideration of the relevant facts of this case make it clear that the decision of the Ninth Circuit was absolutely correct and should be sustained.

LEGAL ARGUMENT

I. LEGAL STANDARDS FOR REVIEW

There are two parts to Petitioners' claim. The first is the granting of the directed verdict pursuant to FRCP 50(a) by the District Court in light of the established facts and relevant law. An order granting or denying judgment as a matter of law is reviewed by the Court on de novo grounds. *See Amarel v. Connell*, 102 F.3d 1494, 1517 (9th Cir. 1996). The decision under this provision is appropriate whenever a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. *See Weisgram v. Marley Co.*, 528 U.S. 440, 447 (2000). If, given proper consideration of that evidence, the evidence fails to establish a proper claim, dismissal is appropriate.

The second aspect of the petition seeks a review of a decision to offer a jury instruction on the issue of nominal damages. Where there is no objection to jury instructions

at the time of trial, the reviewing court looks only for plain error. *See United States v. Rapinsky*, 109 F.2d 1436, 1443 (9th Cir. 1997).[2] If there is an objection, it must be distinctly stated and the grounds for the objection must also be articulated. *United States v. Varela*, 993 F.2d 686, 688 (9th Cir. 1993). A general objection to an instruction does not suffice to preserve the issue on appeal. *Id.* In addition, jury instructions must be viewed as a whole to determine whether they were misleading or inadequate to guide the jury's deliberations. *Id.* Even with an appropriately lodged objection, the formulation of jury instructions is reviewed for an abuse of discretion. *United States v. Vaandering*, 50 F.3d 696, 702 (9th Cir. 1995). Under this standard, the evidence in this case shows the objection was properly tendered without objection. It is too late, therefore, for Petitioner to claim injury from this jury instruction. *See Singer v. United States*, 380 U.S. 24, 38 (1965). Moreover, as a simple matter of law, the judge's decision in issuing the jury instruction was absolutely correct.

II. THERE WAS NO VALID FOURTH AMENDMENT CLAIM FOR UNREASONABLE SEARCH AND SEIZURE

As the Ninth Circuit properly noted, the evidence adduced by Petitioners, at the time they rested their case, did not establish Appellant was an overnight guest or an individual with any possessory interest in the home of

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[2] "Plain error" is a highly prejudicial error effecting substantial rights. *United States v. Payne*, 944 F.2d 1458, 1463 (9th Cir. 1991).

Michael Laing at the time the officers entered the home. Laing testified he gave the officers permission to enter the home. Moreover, the testimony was clear Petitioner Nadell did not come to the home with the intent of spending the night. In fact, at no time was evidence given that she was asked to spend the night or that she made the request to be able to spend the night. Rather, at most she simply wanted to lie down.

There was no evidence given to the jury by Petitioners that she would never have left the home until she was completely sober. There was no evidence provided to the jury as to how long it would take for her to be sober. There is no evidence that she had a possessory interest in the home, historical use of the property, or ability to regulate access. In short, she was little more than a short-term resident which, under the law, failed to give her proper standing to assert a Fourth Amendment unreasonable search and seizure claim for the officers entering the home and/or the bedroom in which she was lying down. Moreover, the exigent circumstances on which the officers arrived at the home warranted their entry therein.

This Court has held an overnight guest has a reasonable expectation of privacy in a friend's residence even though the guest may not have legal authority to determine who may enter the household. *Minnesota v. Olsen*, 495 U.S. 91 (1990). One who is merely present in the home with the consent of the householder, may not claim protection under the Fourth Amendment. *Minnesota v. Carter*, 525 U.S. 83 (1998). Without some evidence given to the jury that Laing had invited her to spend the night or that she had the intent upon arriving at the home to do so, she

had no reasonable expectation of privacy to allege unconstitutional entry and search of the home as a short-term guest. *United States v. Sweeting*, 933 F.2d 962, 964 (11th Cir. 1991). There is no error here.

Moreover, there is no question the officers arrived in response to a domestic violence call and, upon their arrival, saw a large amount of blood and evidence of violence at the residence itself. The Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe a person is in need of immediate aid. *Mincey v. Arizona*, 473 U.S. 385, 393 (1978). Such a situation exists when there is a "need to protect or preserve life or avoid serious injury." *Id.* Upon arriving at the home in response to a domestic abuse call, and seeing the blood, without knowledge that Laing's wife had already been taken to the hospital, there is no question the officers were allowed to enter the home because of a possible medical emergency. *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995), *cert. denied*, 518 U.S. 1020 (1996). These facts are viewed for the totality of circumstances known to the officer at the time of the warrantless entry. *United States v. Warner*, 843 F.2d 401, 403 (9th Cir. 1988).

In the case of *State v. Green*, 164 Ariz. 431, 784 P.2d 257 (1989), the Court was called upon to determine whether an entry by police officers responding to a domestic violence call were legally justified in entering the home without a warrant or even consent. The Arizona Supreme Court held domestic violence calls "commonly involve dangerous situations in which the possibility for physical harm or damage escalates rapidly. Immediate presence of the officer is essential." *Id.* at 259. To require

an officer to have a search warrant before entering a dwelling would create a "meaningless delay" which would lead to the occurrence of otherwise avoidable violence. *Id.* The fact such a call is received was a "sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstances indicate that entry is unnecessary." *Id.* Upon entering the apartment, the Arizona court reasoned the officer could then lawfully take steps reasonably calculated to the continued investigation of the offense and the identification of the perpetrator. *Id.* Included in these steps there would be a protected walk through the building. *Id.* Other courts are in accord. *See People v. Higgins*, 26 Cal. App. 4th 247, 31 Cal. Rptr. 2d 516 (1994); *State v. Lynd*, 54 Wash. App. 18, 771 P.2d 770 (1989); *State v. Raines*, 55 Wash. App. 459, 778 P.2d 538 (1989).

Given these facts and law, it is clear the officers were appropriate in entering the home in the manner that they did and in conducting an investigation which they did. It is also clear, as a matter of law, the district court was correct to dismiss this claim from this litigation and the Ninth Circuit was correct in sustaining that decision. On certiorari, that result should not change.

III. THE JURY INSTRUCTION ON NOMINAL DAMAGES WAS COMPLETELY APPROPRIATE

As indicated, the failure to oppose the giving of an instruction on a timely basis constitutes a waiver of the ability to have the instruction challenged and reviewed on appeal. *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1989). In this case, Judge Pro

modified the nominal damages instruction after an initial objection by Petitioners. After the instruction was modified, no objection was raised. Thus, this issue is moot.

More importantly, the law which this Court articulated in civil rights cases is that nominal damages may be awarded in a civil rights action when sufficient substantive evidence of actual injury is adduced in the minds of the jury. *Carey v. Piphus*, 435 U.S. 247, 255 (1978). Thus, if a plaintiff may prove a violation of constitutional rights, nominal damages are always appropriate. *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir. 1991).

It is important to note, however, that merely proving a violation of a federally secured right is insufficient to warrant an award of damages which are greater than nominal. In fact, there must be credible evidence that the violation proximately caused an injury. *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 659 (6th Cir.), *cert. denied*, 513 U.S. 873 (1994). "The abstract value of a constitutional right may not form the basis for Section 1983 damages." *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 308 (1986). Thus, a nominal damage instruction is always appropriate when there is a violation of a constitutional right without accompanying credible proof of compensatory damages. *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992).

Contrary to Petitioners' claim, a verdict of nominal damages in conjunction with findings of excessive force are not, by definition, incongruous. *See Atkins v. New York City*, 143 F.3d 100, 102 (2nd Cir. 1998); *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996). In *Westcott v. Crinklaw*, 133 F.3d 658, 661 (8th Cir. 1998), the circuit court identified a

number of situations in which a jury may reasonably conclude compensatory damages are inappropriate despite a finding of excessive force; one of these included "when the plaintiff's injuries have no monetary value or are insufficient to justify with reasonable certainty."

As the Ninth Circuit properly noted, there was more than sufficient evidence placed before the jury that the physical injuries which Petitioner attempted to parade before the trier of fact were self-inflicted. They were caused not only by her own self-destructive behavior, but also her direct resistance of the officers' attempts to properly bring her into custody and control. This decision by the trier of fact is beyond cavil. The giving of the instruction is beyond question and, therefore, should not be reversed on certiorari.

CONCLUSION

For the foregoing reasons, Respondents Las Vegas Metropolitan Police Department, Officer Etherton, Officer Leyba and Officer Zeil respectfully request this Court deny Petitioners' Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand.

Respectfully submitted this 1st day of April, 2002.

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